

A review of guidelines for prosecutors in England and Wales regarding sexual transmission of infection

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Background

In England and Wales it is possible to be prosecuted for the sexual transmission of infection under the Offences Against the Person Act 1861 or the Criminal Attempts Act 1981.

After the first prosecutions in 2003, National AIDS Trust (NAT) successfully advocated for legal guidance for prosecutors and worked with the Crown Prosecution Guidance (CPS) to develop this.¹

In 2018 NAT requested that the guidance be updated to reflect the latest developments such as Undetectable=Untransmittable and clinical guidance in the UK.

Developments in case law have led the CPS to take the view that HIV/STI status deception may be capable of vitiating consent to sex.² NAT is concerned that this could result in people who lie about their HIV status being prosecuted for rape or sexual assault, even with safeguards used and no transmission occurring

Description

In January 2019 the CPS shared a draft of their revised guidance with NAT, who then coordinated a joint response from NAT and other key stakeholders. We successfully ensured that the new guidance reflects medical developments. We also prepared a briefing articulating legal, policy and public health arguments against the CPS position that material deception of HIV status may vitiate consent, and presented it at a meeting with the CPS.

As a result the CPS have added several caveats and clarified that charges should only be considered for 'sustained and calculated deception'. However, we still disagree with the CPS interpretation of judgments made in case law.

Even accepting the CPS position on case law, the circumstances are frauds around condom use, point of ejaculation and the sex of the partner; all of these are related to the sexual act. We argue that where there is no HIV transmission risk, HIV is not relevant.

Lessons learned

The successes we have had in improving the guidance demonstrate the importance of long-standing proactive engagement, relationship-building and collaboration. Collaborating with a range of key stakeholders including clinicians and lawyers enabled NAT to leverage wider authority and expertise.

However, the issue of HIV status deception has illustrated the implications for HIV of legal developments in related but not directly transferable areas. Confidence in our understanding of the law and persistence in making our arguments heard has been crucial in ensuring ongoing engagement on this issue.

References

[1] Intentional or Reckless Sexual Transmission of Infection, Crown Prosecution Service, <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection>

[2] Relevant case law includes *McNally*, *Assange* and *R v MONICA*

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Conclusions

The updated guidance will help to ensure that prosecutions for reckless or intentional transmission are conducted in a way that minimises harm to both individuals and the wider community.

Regarding the issue of HIV status deception, possible next steps include securing parliamentary engagement, pro bono legal opinions, and further representations from local government and public health bodies.

The CPS remains in contact with NAT and partners on this issue.